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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-855

HELEN A. COHEN,

Petitioner,

vs.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, JAMES J. BROPHY, JOHN T. RETTALIATA, and MAYNARD P. VENEMA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Twice the District Court dismissed Petitioner's complaint for failure to allege a federal cause of action. The court held that no state action was alleged for which a Section 1983 and 1985(3) complaint could lie. Twice the Court of Appeals for the Seventh Circuit affirmed the dismissal. Twice the Court of Appeals denied Petitioner's requests for a rehearing. Twice not one single member of the Court of Appeals voted to hear the Petitioner's appeal *en banc.*

And now, for the second time, Petitioner asks this Court to review the dismissal of her complaint. Respondents hereby oppose the petition for certiorari.

OPINIONS BELOW

The District Court for the Northern District of Illinois initially dismissed the Petitioner's complaint on October 29, 1974. The decision is reported at 384 F. Supp. 202.

The dismissal was affirmed by the Court of Appeals for the Seventh Circuit on October 28, 1975. This decision is reported at 524 F.2d 818.

Petition for certiorari was denied on April 19, 1976. The denial was reported at 425 U.S. 943.

Petitioner's motion to amend her complaint was denied by the District Court on March 25, 1977. This decision is set forth in App. G of Petitioner's Appendix to this Petition.

The denial was affirmed on August 2, 1978. This decision is reported at 581 F.2d 658.

QUESTION PRESENTED

Did the District Court abuse its discretion in denying Petitioner's motion to amend her complaint?

STATEMENT OF THE CASE

Petitioner (at p. 4 of her Petition) erroneously states that she received leave to amend her complaint. She did not. Petitioner did obtain an order from the Court of Appeals that the District Court should consider and decide the Petitioner's motion for leave to amend, but specifically noted that "This Court does not hereby express any opinion regarding the merits of the Petitioner's motion to amend her complaint." (App. p. 28a)

Further, Petitioner erroneously characterized the Court of Appeal's first decision (at p. 4 of her Petition) as one

which "delineated the allegations necessary to state a claim. . . ." But, to the contrary, the Court of Appeals specifically noted that its original decision did not draw out with specificity the necessary allegations. Rather the Court of Appeals "set out the general nature of the allegations needed but did not state what specific facts need be alleged." (App. p. 41a)

Finally, Petitioner misleadingly quotes from the Court of Appeals' last decision by quoting from that Court's summary of her own argument. Thus, she states (at p. 4 of her Petition) that the "Court of Appeals has now held that the amended complaint, though it 'contain[s] the precise language noted by the Court, to have been missing from original complaint' does not state a claim. . . ." (App. I, at 38A) What the Court of Appeals held was (App. p. 41a):

> "We agree with the District Court that the proposed amendment 'does not allege affirmative governmental support or approval of any discriminatory act or policy of defendants.'
>
> Lastly, the District Court was not stripped of its discretionary power to deny the motion to amend the complaint because of the law of the case doctrine. *Cohen I* set out the general nature of the allegations needed but did not state what specific facts need be alleged. In failing to specify what underlying facts would be sufficient to support such a general allegation, we did not obviate the requirement of including the necessary factual allegations. Hence, Cohen's repetition of broad conclusions without additional facts establishing that the defendants acted under color of state law in their discrimination against her is insufficient. Nothing more than general categorizations are to be found in the proposed amendment; a mere recitation of broad conclusory language misses the

mark. As we fail to see how the proposed amendment escapes the deficiencies of its precursor, we hold that the amended complaint, like the original, fails to state a federal cause under 42 U.S.C. §1983."

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. The Addition of A Conclusory Allegation Did Not Create A Valid Complaint.

Petitioner claims that the dismissal of her complaint violates the rule of *Conley* v. *Gibson*, 355 U.S. 41 (1967). *Conley* merely restated the general rule that a plaintiff need not "set out in detail the facts upon which he bases his claim." (at p. 47) This does not mean, nor has this Court ever held, that mere conclusory allegations are sufficient to support a complaint. The "less stringent standards" applied to a *pro se* complaint in *Haines* v. *Kerner*, 404 U.S. 519 (1972) have no application to the case at hand, in which Petitioner has been represented by counsel throughout.

Petitioner initially alleged that state action was involved because, *inter alia*, (1) certain graduate students worked at state agencies as part of their graduate program (Para. 8(h) of the Complaint, see App. P. 10a); (2) the university conducted seminars in cooperation with state agencies (Para. 8(i) of the Complaint; see App. p. 10a); (3) the university administered a state scholarship program (Para. 8(m) of the Complaint, see App. p. 11a); and (4) the university solicited the power of eminent domain from the state (Para. 8(n) of the Complaint, see App. p. 11a). The District Court originally concluded that these allegations did not create state action, and the Court of Appeals affirmed.

Thereafter, Petitioner attempted to amend her complaint by alleging that the four allegations of university involvement with the state "significantly supports and contributes to the effectiveness" of the alleged sex discrimination. (Para. 8(o) of the Amendment; see App. p. 37a) Petitioner further alleged that the Respondent university "is dependent on such state support" and that:

> "Both the State and the Federal support are contingent upon the Defendants' not engaging in discriminatory hiring or employment practices, and the continuation of such support constitutes State and Federal approval of the conduct complained of herein." (App. p. 37a)

These conclusory allegations do not create a federal cause of action. Even applying the more liberal, and here inapplicable, *Haines* rule, (404 U.S. 519) this Court has held that a review of the factual allegations of a complaint may clearly show that the alleged cause of action did not exist. *Estelle* v. *Gamble*, ... U.S. ....., 97 S. Ct. 285, 293 (1976).

The Court in *Haines* referred to *less* stringent standards applying to a *pro se* complaint. The obvious implication is that a complaint drafted by an attorney must at least meet some standard of setting forth a cause of action. Mere conclusions will not, and do not, suffice.

In *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 233 (1st Cir. 1977) the court quoted from Wright & Miller, *5 Federal Practice and Procedures* Civil §1357 (1969):

> ". . . courts do 'not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened.' . . ."

See *Koch* v. *Yunich*, 533 F.2d 80, 85 (2nd Cir. 1976); *Kauffman* v. *Moss*, 420 F.2d 1270, 1275 (3rd Cir. 1970) *cert. denied* 400 U.S. 846 (1970); *McGuire* v. *Todd*, 198 F. 2d 60, 63 (5th Cir. 1952) *cert. denied* 344 U.S. 835; *Place* v. *Shepherd*, 446 F.2d 1239 (6th Cir. 1971); *Anderson* v. *Sixth Judicial District Court*, 521 F.2d 420 (8th Cir. 1975); *Means* v. *Wilson*, 522 F.2d 833, 840 (8th Cir. 1975) *cert. denied* 424 U.S. 958; *Hoffman* v. *Halden*, 268 F.2d 280, 294 (9th Cir. 1959).

In *Coates* v. *Ill. State Bd. of Ed.*, 559 F.2d 445, 447 (7th Cir. 1977) the court stated:

> "Especially in the school desegregation area, conclusory pleading such as evidenced in this complaint is woefully inadequate. Direct linkage between the facts pleaded and the violation asserted must exist on the face of the complaint. Put another way, a 'plaintiff is required to set forth specific illegal misconduct and resultant harm in a way which will permit an informed ruling whether the wrong complained of is of federal cognizance.' *Duncan* v. *Nelson*, 466 F.2d 939 (7th Cir. 1972), *certiorari denied*, 409 U.S. 894, 93 S. Ct. 116, 34 L.Ed.2d 152."

In the case at hand, Petitioner was advised that her complaint was deficient; she was told that state action requires a connection between the state and the action complained of, and she then alleged that the state "supported" the action complained of. This conclusory allegation does not find support in her earlier allegations of state involvement. The District Court properly concluded (App. 30a):

> "The new allegation merely alleges the condition upon which financial support is granted to the defendants, except for the conclusory speculation that this 'constitutes State and Federal approval' of defendants' alleged discriminatory practices. In our opinion, this does not allege affirmative governmental support or approval of any discriminatory act of policy of defendants (524 F.2d at 824) and, in fact, contradicts the prior reasonable allegation that government financial support is contingent upon non-discrimination."

As pointed out by the District Court in *Morpurgo* v. *Bd. of Higher Ed. in City of New York*, 423 F. Supp. 704, 713 (S.D.N.Y. 1976):

> ". . . liberal construction of pleadings should not be permitted to override completely the rights of defendants."

The respondents are entitled to be free from further federal litigation of this matter. The petition should be denied.

II. No Conflict Between The Courts of Appeal Exists With Respect to What Constitutes State Action.

Petitioner urges that various courts of appeal are sharply split as to what constitutes state action. (Petition p. 14). We submit that no such conflict exists.

Petitioner apparently believes that the "symbiotic relationship" basis for finding state action is contrary to, or inconsistent with the so-called "nexus" basis. Thus, she argues that *Braden* II (*Braden* v. *Univ. of Pittsburgh*, 552 F.2d 948 (3rd Cir. 1977)) did not follow the *Cohen* I decision (524 F.2d 818) because the Third Circuit did not accept the "nexus" test. However, all that *Braden* II held was that the *Cohen* decision was inapplicable (at p. 964):

> "Nevertheless, *Cohen* would appear to be distinguishable from the case at hand—chiefly because there is

no statutory program which inextricably links I.I.T. to the State of Illinois. Contrary to the Pitt situation, the level of financial support offered I.I.T. by the state is minimal. Judge Stevens expressly stated that 'the funds contributed by the State represent only a small fraction of the cost of educating the students. . . .' In addition, I.I.T. selected its own institutional name, unlike the statutory designation of the University of Pittsburgh as a Commonwealth school. Moreover, the regulations imposed by the state are far less extensive in *Cohen* than in the present case. Basically, the Illinois provisions speak to the issue of accreditation and little else, whereas the University of Pittsburgh-Commonwealth Act is far more sweeping in its scope.

Perhaps the most important basis for distinguishing *Cohen* from this case is the absence there of other indicia of a close relationship between the state and the university, including, *inter alia,* (1) governmental participation in determining the composition of the board of trustees, (2) the review of the expenditure of private funds by state officials, (3) onerous reporting requirements, (4) a legislative history which discloses that the state desired to utilize the educational facilities of an existing institution rather than create new ones itself; and especially (5) the statutory declaration that Pitt is an 'instrumentality' of the Commonwealth. Indeed, the *Cohen* opinion vigorously emphasizes that there was no 'evidence that [I.I.T. is . . . a State instrumentality. . .' Had there been such evidence in *Cohen,* the Seventh Circuit may well have reached an opposite result and found state action. By its own terms, then, *Cohen* constitutes a case considerably different from the one with which we are now concerned."

In her first petition for certiorari, Petitioner also argued that there was a majority view ("significant state aid" constitutes state action) and a minority view (a

nexus is required). Her identical argument now is no more valid than before. The tortured attempt to find a conflict is not supported by the cases.

III. Petitioner's Argument That Section 1985(3) Is A General Tort Law Is Unmeritorious.

Petitioner finally urges that this Court should review the decision below because this Court has not yet decided whether §1985(3) can reach a conspiracy such as alleged in this case. The same argument was made in the first petition for certiorari.

Petitioner states that the First, Second, Third, Sixth and Eighth Circuits have ruled that §1985(3) would apply in a case such as this. In support of this conclusion she cites a number of cases in which there was no question but that state action was involved, or cases in which federal constitutional or statutory rights were involved.

We submit that this case is not the vehicle upon which the Court can, should it desire, amplify on the scope of Section 1985(3).

The language of the concurring and dissenting opinions in *United States* v. *Guest,* 383 U.S. 745 (1966) is not inapposite as Petitioner argues. While those opinions suggest that Section 5 of the Fourteenth Amendment empowers Congress to enact laws punishing all conspiracies which interfere with a Fourteenth Amendment right, the Fourteenth Amendment right referred to was "the right to equal utilization of *state facilities.*" (Italics supplied) *United States* v. *Guest,* 383 U.S. at 761 and 777. The language in those separate opinions in *Guest* does not suggest that Section 5 of the Fourteenth Amendment could reach wholly private conspiracies to deprive an individual

of a claimed right to equal utilization of a *private* facility. State involvement is key to triggering the protection of the Fourteenth Amendment. The decision in *Guest* is consistent with the holding in *United States* v. *Price,* 383 U.S. 787, 799 (1966), decided by this Court on the same day, that the Fourteenth Amendment only protects against state action.

Members of this Court have indeed differed as to the scope of Section 5 of the Fourteenth Amendment. But not one member has suggested that it authorizes a general federal tort law. "As we have consistently held 'The Fourteenth Amendment protects the individual against *state action,* not against wrongs done by individuals.' *Williams I,* 341 U.S. at 92. . . ." *United States* v. *Price,* 38 U.S. 787, 799 (1966). In *United States* v. *Guest,* 383 U.S. 745 (1966) Mr. Justice Brennan stated that a majority of the members of this Court were expressing the view that Section 5 empowered Congress ". . . to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights. . . ." (383 U.S. at 782) But not one member of this Court has suggested that a private employer's alleged discrimination in determining whom he shall employ violates a Fourteenth Amendment right.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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